

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Southern Pacific Transportation Company (Western Lines)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned junior employe J. Anzo, Jr. instead of Mr. R. J. Stokes to the foreman's position on Tie Gang T-6 as advertised on Bulletin 103 dated October 26, 1987 (Carrier's File MofW 138-91).

(2) As a consequence of the aforesaid violation, Mr. R. J. Stokes shall be assigned to the position of foreman on Tie Gang T-6 and he shall be allowed the difference between what he earned (straight time and overtime) on other positions and what he would have earned if assigned to the foreman's position on Tie Gang T-6."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

This Claim challenges the propriety of Carrier's awarding a Foreman vacancy on Regional Tie Gang T-6 to a junior employee.

In its Ex Parte Submission, the Organization included information and argument in support of an alleged violation of Rules 8 and 10 of the Agreement. Our review of the record, however, discloses that such issues were not raised prior to submission of the matter to this Board. The correspondence exchanged on the property alleges violations only of Rules 1, 2, 3, 5, 6 and 7. Moreover, the prior Awards cited by the Organization all deal with the interpretation of the same or substantially similar language, found in Rule 7 of the instant Agreement, which provides in pertinent part as follows:

"Fitness and ability being sufficient,
seniority shall prevail."

The record reveals that the parties handled this Claim as a fitness and ability dispute under Rule 7. Since they did not consider alleged violations of Rules 8 and 10 on the property, neither will we consider them here.

This Board has held over many years that Carrier has the right to determine the fitness and ability of an employee for a particular position and such determination will not be disturbed unless it can be shown by a preponderance of evidence that Carrier acted arbitrarily and capriciously. See Third Division Awards 20724, 12994, 23860, 24068, 26433.

The record in this matter consists of assertion and counter-assertion with scant factual backing. What factual information does exist, however, tends to corroborate Carrier's assertions.

Carrier denied Claimant the Foreman position on the large Regional Tie Gang T-6 saying in part,

"Since you have been acting as Foreman of XG 60, you have demonstrated a lack of initiative and inability to meet production requirements of that gang. Your attitude towards instructions from your supervisors has also been unacceptable."

In later correspondence, Carrier said in part,

"Claim was discussed with you in conference on February 8, 1989 at which time I advised you that [Claimant], Foreman of Extra Gang 60, while working on the Dunsmuir District, was not able to meet production requirements due to lack of initiative to make use of all available track time. When claimant's gang (No. 60) returned to Dunsmuir, California, Carrier required extra gang 60 to work weekends due to the long slow order between Mott and Sims. Claimant wrote a letter to the Carrier dated October 20, 1987 stating 'I will not claim time if another Foreman is called in to work my Foreman job on the week-ends. This is for all Saturdays.' Claimant refused to work weekends due to other interests."

On November 9, 1987, Claimant received a formal letter of instruction due to his failure to report to work at the designated time and place on Saturday, October 31, 1987 and Sunday, November 1, 1987, as instructed by Roadmaster D. F. Holleman.

It is Carrier's opinion that Claimant can hardly handle his position on a five-man surfacing gang let alone be a foreman of a thirty-four (34) man regional production tie gang, which would entail a large amount of responsibility plus weekend work (which Claimant will not accept)."

The record contains Claimant's October 20, 1987 letter expressing his desire to defer weekend work to other employees. This letter is dated only six days prior to date of the vacancy bulletin herein. Also in the record is the formal letter of instruction regarding Claimant's failure to report for weekend work. The Board notes that Claimant refused to sign an acknowledgement of receipt of the letter.

On this record, while the factual support is minimal, the Board finds that Carrier's assessment of Claimant's fitness and ability for the vacancy was rationally based. On the other hand, the Organization's evidence consists of little more than unsupported counter-assertions. It falls short of showing, by a preponderance of the evidence, that Carrier's assessment was arbitrary and capricious. Accordingly, Carrier's decision must stand.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of August 1991.